Nos. 76-5761 and 76-5796

In the Supreme Court of the United States

OCTOBER TERM, 1977

MICHAEL LEE SIMPSON and TOMMY WAYNE SIMPSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL LEE SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

H. BARTOW FARR, III,
Assistant to the Solicitor General,

WILLIAM G. OTIS,
JOHN J. KLEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The unpublished order of the court of appeals (App. 29-30) is noted at 542 F.2d 1177.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1976 (App. 29). A petition for rehearing was denied on November 9, 1976 (App. 31). The petition for a writ of certiorari in No. 76-5761 was filed on November 26, 1976, and in No. 76-5796 on December 3, 1976. The petitions were granted on April 18, 1977 (App. 32-33). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant convicted of assault or endangering life by "the use of a dangerous weapon" during a bank robbery, in violation of 18 U.S.C. 2113(d), can be convicted and consecutively sentenced for using a firearm during the robbery, in violation of 18 U.S.C. 924(c).

STATUTES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; * * *
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> * * * * *

> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. 924(c) provides:

> Whoever—
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of aggravated bank robbery and of using firearms to commit the robbery, in violation of 18 U.S.C. 2113(a) and (d) and 924(c). Each was sentenced to consecutive terms of 25 years' imprisonment on the robbery count and 10 years' imprisonment on the firearms count (App. 25-26). After another jury trial for a second robbery, petitioners were again convicted of one count of aggravated bank robbery and of one count of using firearms to commit the crime. Each was sentenced to 25 years' imprisonment for the robbery and 10 years' imprisonment for the firearms count, the sentences to run consecutively to each other and to the sentences previously imposed (App. 27-28). The court of appeals affirmed in a consolidated appeal (App. 29-30).

On September 8, 1975, petitioners robbed at gunpoint the East End Branch of the Commercial Bank of Middlesboro, Kentucky, taking approximately $40,000. Less than two months later, on November 4, 1975, petitioners returned to Middlesboro, where they robbed the West End Branch of the Commercial Bank. This robbery was also accomplished at gunpoint, and again about $40,000 in bank funds was taken (App. 21-22).

To accomplish their escape after the second robbery, petitioners stole the bank manager's automobile after locking the bank personnel in the vault. A police roadblock was set up outside of town, and,

after an exchange of gunfire, petitioners were taken into custody (App. 13).

At sentencing following each conviction, counsel for petitioners argued that the aggravated robbery conviction merged with the firearms offense for purposes of sentencing, thereby precluding cumulative punishment for the two crimes (App. 8-10, 17). The trial court disagreed, ruling that Section 924(c) creates a separate offense for which "the statutes and the legislative history indicate[ ] an intention to impose an additional punishment" (App. 17). Applying the same reasoning, the court of appeals affirmed petitioners' convictions and sentences (App. 29-30). Because of an apparent conflict between the decision below and the decision of the Eighth Circuit in *United States* v. *Eagle*, 539 F.2d 1166, the United States did not oppose the petitions for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principal question in this case is one of congressional intent: whether Congress intended that a defendant convicted and sentenced for assault or endangering life with a deadly weapon during a bank robbery (18 U.S.C. 2113(d)) may also be convicted and sentenced for using a firearm in the commission of that bank robbery (18 U.S.C. 924(c)). As petitioners apparently recognize, there is no real issue under the Double Jeopardy Clause because the two offenses are sufficiently different to meet the standard laid down in *Blockburger* v. *United States*, 284 U.S. 299, 304: "whether each [statutory] provision requires proof of a fact which the other does not."

That test is satisfied here, because under Section 924 (c)(1) the prosecution must prove that the defendant used a firearm to commit a federal felony but need not show that the defendant assaulted anyone or placed anyone's life in danger, whereas under Section 2113(d) the prosecution must prove that the defendant, while committing bank robbery or larceny, either assaulted or endangered the life of another person "by the use of a dangerous weapon or device" but need not show that the weapon or device was a firearm.

The case, therefore, turns on the language and legislative history of Section 924(c). The text of Section 924(c) plainly states that it is to apply to use of a gun to commit "any felony for which [the defendant] may be prosecuted in a court of the United States" and that punishment under that section shall be "in addition to the punishment provided for the commission of such felony." Section 924(c) also sets forth comprehensive penalties, including special provisions regarding multiple offenses, minimum sentences, suspended or probationary sentences, and (after amendment) concurrent sentences, which are substantially more far-reaching and specific than the penalty provisions of Section 2113(d) and comparable statutes.

The legislative history reveals a commitment by Congress to combat with strong measures the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." During the House floor debates on Section 924(c), several legislators (including sponsoring Congressman Poff) indicated that the provision would encompass all felonies punishable in federal court and stressed the need for tough sentencing laws that would deter potential felons from carrying a firearm during their crimes. One Congressman specifically addressed the distinction between firearms and other dangerous weapons, noting that "use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons effective only at a very short range." Moreover, a Senate bill, designed as a counterpart to the already-approved House bill, made clear that it should apply to all federal felonies, including those already penalizing assaults with a dangerous weapon.

We believe that the terms of Section 924(c) and its overall legislative history evidence a congressional intent at variance with the statement of Congressman Poff that it "was not intended to apply to title 18 * * * sections 2113 or 2114 concerning armed robberies of the mail or banks * * *." Neither the Act nor its legislative history suggests that this view, not committed to writing and offered in passing during a floor debate largely concerned with other matters, was understood by or commended itself to a majority of the voting House members, much less to a majority of the Senate members that voted on the final bill. Under these circumstances, and in view of the awkward consequences of Congressman Poff's construction, we submit that this statement should not be accorded conclusive weight.

ARGUMENT

I. THE IMPOSITION OF CUMULATIVE PENALTIES FOR USE OF A FIREARM TO COMMIT A FELONY AND AGGRAVATED BANK ROBBERY DOES NOT OFFEND THE DOUBLE JEOPARDY CLAUSE

For present purposes, we may assume that the Double Jeopardy Clause forbids the imposition of cumulative penalties when a person is convicted of two crimes, one of which is a lesser included offense of the other. See *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977, slip op. 4-5; *Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, slip op. 17; *North Carolina* v. *Pearce*, 395 U.S. 711, 717. On the other hand, it is settled that there is no *constitutional* inhibition to multiple sentences if the offenses are sufficiently distinguishable to meet the test laid down in *Blockburger* v. *United States*, 284 U.S. 299. *Brown* v. *Ohio*, *supra*, slip op. 5; *Iannelli* v. *United States*, 420 U.S. 770, 782; *Gore* v. *United States*, 357 U.S. 386, 392-393. The question, then, is simply one of congressional intent. *Jeffers* v. *United States*, *supra*. Accordingly, we consider first whether the crimes defined in Sections 2113(d) and 924(c)(1) are "separate" offenses for double jeopardy purposes.

As we have just noted, the standard set forth in *Blockburger*, *supra*, has long been recognized as "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment" (*Brown* v. *Ohio*, *supra*, slip op. 5). Although some exceptions (not relevant here) have been noted (see *Brown* v. *Ohio*, *supra*, slip op. 5-6, n. 6), "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not" (*Blockburger* v. *United States*, *supra*, 284 U.S. at 304). As "[t]his test emphasizes the elements of the two crimes" (*Brown* v. *Ohio*, *supra*, slip op. 5), it is not significant that proof of the several crimes in some cases may be coincidental. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes" (*Iannelli* v. *United States*, 420 U.S. 770, 785, n. 17).

The *Blockburger* test is plainly satisfied in the present case. Under Section 924(c)(1) the prosecution must prove that the defendant used a firearm to commit a federal felony but need not show that the defendant committed an assault or placed any life in danger. Nor must the prosecution prove that the felony committed was a bank robbery, aggravated or not. Under Section 2113(d), the prosecution must prove not only that the defendant committed bank robbery or larceny but that in the process he either assaulted another person or endangered the life of another person "by the use of a dangerous weapon or device." It need not show that the dangerous weapon or device was a firearm but may meet its burden by showing that the defendant used a knife, lead pipe, or other weapon effective only at a limited

range. Moreover, some courts of appeals have required a showing that the weapon was in fact immediately capable of inflicting harm, a further requirement inapplicable to use of a firearm under Section 924(c). See, *e.g.*, *United States* v. *Thomas*, 521 F.2d 76 (C.A. 8); *United States* v. *Marshall*, 427 F.2d 434 (C.A. 2). Contra, *United States* v. *Beasley*, 438 F.2d 1279 (C.A. 6), certiorari denied, 404 U.S. 866.

It is thus apparent that a defendant can be convicted under either Section 924(c) or Section 2113(d) yet acquitted under the other. For example, a defendant who employs a dangerous weapon other than a firearm faces liability only under Section 2113(d) and is not subject to the minimum sentence provisions and other restrictions of Section 924(c). Likewise, a defendant who uses a firearm to commit larceny in an unoccupied bank under Section 2113(b) is not subject to the assault or endangerment provisions of Section 2113(d). Nor would there be a conviction under Section 2113(d) for carrying an unloaded firearm in those circuits holding that a present ability to inflict serious harm is necessary under that Section; by contrast the definition of a firearm for purposes of Section 924(c) includes an unloaded weapon. 18 U.S.C. 921(a)(3).

Satisfying the *Blockburger* test ends any constitutional challenge to the convictions and sentences in these cases. Indeed, it goes further: the *Blockburger* test "serves a * * * function of identifying congressional intent to impose separate sanctions for multiple

offenses arising in the course of a single act or transaction." *Iannelli* v. *United States*, *supra*, 420 U.S. at 785, n. 17. Nevertheless, there remains at least a possibility that Congress, although constitutionally free to impose additional penalties for violation of 18 U.S.C. 924(c) in a case like the present one, has otherwise disclosed its intention not to do so. We therefore turn to that question.

II. THE IMPOSITION OF CUMULATIVE PENALTIES FOR USE OF A FIREARM TO COMMIT A FELONY AND AGGRAVATED BANK ROBBERY IS CONSISTENT WITH THE CONGRESSIONAL INTENT

A. Section 924(c) by its terms punishes the use or possession of a firearm during the commission of any federal felony and contains specific and comprehensive penalty provisions for that offense.

From *United States* v. *Wiltberger*, 5 Wheat. 76 (1820), through *Scarborough* v. *United States*, No. 75-1344, decided June 6, 1977, slip op. 6, this Court has recognized that the primary guide to the meaning of a statute is its text. This settled rule of construction depends not on any rigid notion that other available aids to interpretation are inconsequential (see *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10) but on the common-sense idea that Congress best indicates what it means by what it says. Where "there is no ambiguity in the words [of the statute], * * * there is no justification for indulging in uneasy statutory construction" (*Barrett* v. *United States*, 423 U.S. 212, 217).

Section 924(c) on its face contains little hint of ambiguity. It states plainly that it applies to anyone who "uses a firearm to commit *any felony* for which he may be prosecuted in a court of the United States" and directs without equivocation that such a person "shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years."[1] A felony for such purposes is defined by 18 U.S.C. 1(1) as "[a]ny offense punishable by death or imprisonment for a term exceeding one year," a definition that clearly includes bank robbery and aggravated bank robbery in violation of 18 U.S.C. 2113(a) and (d). Thus, the statute by its terms would seem to provide an additional penalty for commission of a federal felony with a firearm, whether or not a separate provision increased the penalty for use of a firearm or other dangerous weapon.

This construction is reinforced by the fact that Section 924(c) provides penalties qualitatively (as well as quantitatively) different from the penalties incorporated in the aggravated bank robbery statute or similar laws dealing with "dangerous weapons." Far from merely providing for longer terms of incarceration, Section 924(c) establishes mandatory minimum sentences, imposes increasingly severe sentences on recidivists (without possibility of suspension or probation), and prohibits concurrent sentenc-

[1] More severe sanctions are imposed upon a second or subsequent offender, who faces a sentence of at least two and as many as 25 years' imprisonment.

ing. Thus, a first offender under Section 924(c) must receive at least a one-year consecutive sentence, while a second-time offender must serve (without suspension or probation) a minimum two-year consecutive sentence and may receive (without suspension or probation) a consecutive 25 year sentence. As we later discuss (see pp. 16-25, *infra*), these comprehensive penalties reflect Congress' determination to curb the particularly lethal risks created by the use, not just of any dangerous weapon, but specifically of a gun.

By contrast, Section 2113(d) does not prescribe mandatory minimum sentences, nor does it prohibit concurrent sentences or probation. Moreover, the maximum sentence of 25 years' imprisonment under Section 2113(d) is only five years greater than the maximum sentence for simple bank robbery under Section 2113(a),[2] though it is 15 years more than the maximum for larceny under Section 2113(b) and 24 years longer than the maximum for petit larceny under Section 2113(b). Were petitioners' reading of congressional intent correct, therefore, a bank robber armed with a gun would be subject at most to an additional five years' imprisonment for his first offense (with no mandatory minimum sentence), while all other felons so armed would be exposed to an additional sentence of at least one, and possibly 10 years. If the gun-wielding bank robber were a recidivist, he

[2] A maximum fine of $5,000 under Section 2113(a) is increased to $10,000 under Section 2113(d).

would remain exposed to only five additional years of imprisonment (with no mandatory minimum) under Section 2113(d), with the possibility of probation or a concurrent sentence, whereas all other persons twice convicted of using a firearm to commit a felony would face an additional consecutive sentence of at least two and possibly 25 years' imprisonment without suspension or probation under Section 924(c). In light of these differences, it is unlikely that Congress intended punishment under Section 2113(d) for bank robbers to preempt the important sentencing provisions of Section 924(c).

It can be argued, of course, that Congress expected prosecutors, as a means of avoiding this curious result, to prosecute armed bank robberies and larcenies under Section 2113(a) or (b) and Section 924(c) alone, abandoning the provisions of Section 2113(d). But, whatever sense this argument might make in the context of bank robberies under Section 2113(a), it leads to equally curious results under Section 2113(b). Because Section 2113(d) permits a greater sentence for armed offenses under Section 2113(b) than would Section 924(c), a person using a knife to commit larceny in a bank would face 25 years' imprisonment, while his counterpart with a gun would face only 20 years as a first offender. Were the value of the stolen property less than $100, the 25-year maximum under Section 2113(d) would stand in contrast to an 11-year maximum for a first offender under Sections 2113(b) and 924(c). In view of these peculiar consequences,

it seems far more reasonable to read Section 924(c), as it is written, to provide not alternative penalties but penalties "in addition to the punishment provided for the commission of [the underlying] felony."

We further note that, had Congress in fact desired to create an exception of the sort that petitioners desire, it had a convenient opportunity to do so in the drafting of Section 925 of the Gun Control Act of 1968, entitled "Exceptions; Relief from disabilities." In that Section Congress explicitly stated that "[t]he provisions of this chapter shall not apply with respect to" a list of carefully defined acts that otherwise would have been unlawful.[3] Yet nowhere in that Section is there an indication that the applicability of Section 924(c) was limited to certain federal felonies. In view of that silence, it is inappropriate for the courts to permeate a statute with major exceptions that Congress could have adopted but never did. See *Yates* v. *United States*, 354 U.S. 298, 305; *United States* v. *Bass*, 404 U.S. 336, 339; *Huddleston* v. *United States*, 415 U.S. 814, 831.

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[3] In sum, Section 925 excludes from the provisions of the Act the transportation or importation of firearms and ammunition which are furnished to the United States or to any state or political subdivision or sold, issued, or shipped by the Secretary of the Army in support of enumerated military and civilian training activities.

B. The legislative history of the Gun Control Act supports the unambiguous language of Section 924(c).

The legislative history of Section 924(c), while hardly extensive, is generally consistent with the belief that Congress intended to step up the punishment of federal felonies committed with firearms. Although one statement by Congressman Poff puts forth a contrary view, we do not regard it as of sufficient weight to override the language of the statute and other strong indicia of congressional intent.

The Gun Control Act of 1968 (Pub. L. 90-618, 82 Stat. 1213), of which Section 924(c) became a part, was enacted largely in response to a single concern: the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime" (H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968)). The worsening crime situation in recent years had aroused considerable attention and alarm in Congress. During 1967, Congress held extensive hearings on crime control legislation, including proposed gun control bills, in which frequent references were made to the fact that firearms were used in approximately 5,600 murders, 34,700 aggravated assaults, and the vast majority of 68,400 armed robberies during 1965 and that guns killed all but 10 of the 278 law enforcement officers murdered in the preceding five years.[4]

[4] These figures were set forth in the Report by the President's Commission on Law Enforcement and Administration of Justice, published in February 1967, as *The Challenge Of Crime In A Free Society*, p. 239. See Hearings on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386 before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess. 213, 242, 261 (1967) The Crime Commission's Report was also considered by the Senate Judiciary Committee in connection with the legislation eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968. S. Rep. No. 1097, 90th Cong., 2d Sess. 31 (1968). The Committee Report on that bill cited further statistics on the use of firearms in the commission of serious crimes, indicating significant increases in 1966 and 1967 over the 1965 figures reflected in the Crime Commission Report (*id.* at 76).

More recent and even more troubling statistics on the use of firearms in violent crime were cited in Attorney General Clark's letter to Congress requesting adoption of the Gun Control Act (H.R. Rep. No. 1577, *supra*, at 18-20) and in the Senate and House Judiciary Committee Reports on the Act (*id.* at 7-8; S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)).

Congress confronted the danger revealed by these figures with a two-pronged approach. First, it expanded federal control over the sale and shipment of firearms across state lines by prohibiting gun sales to out-of-state purchasers and to minors and by forbidding their purchase through interstate mail orders. See 18 U.S.C. 922. Second, it attacked the crime problem directly by punishing the use of firearms in the commission of serious crimes. Section 924(c), introduced and adopted on July 19, 1968,[5] was addressed to the second objective.

[5] Because the statute was introduced and approved on the same day, there are no legislative hearings and no committee reports concerning it; the pertinent legislative history is contained in a few pages of the Congressional Record and consists primarily of the views of supporters of the House bill and its Senate counterpart.

The language which became Section 924(c) was offered by Congressman Poff as a substitute for a floor amendment made by Congressman Casey to the House version of the Gun Control Act.[6] That amendment had provided stiff minimum penalties for anyone who, "during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce" (114 Cong. Rec. 22229 (1968)).[7] Supporters of the Poff substitute noted that the Casey language applied to the use or possession of firearms in state as well as federal felonies, and would thereby convert thousands of state offenses into federal violations. This result was criticized both as an intrusion upon state jurisdiction and as the progenitor of an unmanageable load of criminal cases in the federal system. See *id.* at 22232-22235. Other Congressmen felt that the provision violated principles of due process and equal protection

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[6] Some minor changes concerning the penalty provisions of the Poff proposal were adopted later. See note 9, *infra*.

[7] The text of the amendment provided:

> That whoever during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce shall be imprisoned—
>
> (1) in the case of his first offense, for not less than ten years;
>
> (2) in the case of his second or more offense, for not less than twenty-five years.

or that the burden of proving the jurisdictional nexus unacceptably weakened the amendment. *Id.* at 22231 (remarks of Congressman Poff); *id.* at 22233 (remarks of Congressman Cramer).

The substitute bill presented by Congressman Poff was intended to cure the perceived defects in the Casey proposal by making it a separate federal offense to use or unlawfully carry a firearm during the commission of "any felony which may be prosecuted in a court of the United States" (*id.* at 22231). In introducing his proposal, Congressman Poff made clear his intention to strengthen, not weaken, the Casey language:

> [M]y amendment is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment. Rather, it retains its central thrust and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment. [*Ibid.*]

In particular, the Poff substitute provided for escalating mandatory minimum sentences, without the possibility of concurrent sentencing, and encompassed all federal felonies, not merely those felonies enumerated in the Casey proposal.

Despite the broad language, however, Congressman Poff made an additional statement that provides virtually the entire basis for petitioners' argument in this case. After noting that his amendment did not pertain to state offenses, Congressman Poff further stated:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply

> to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies. [114 Cong. Rec. 22232 (1968).]

No response or other comment was directed at this remark, and the debate reverted immediately to the issue of excluding state crimes.

As petitioners apparently believe that the statements made by Congressman Poff should be given conclusive effect, and treated as though they were included in the text of the statute, it is essential to determine the appropriate degree of weight that they should be accorded. Although the words "any felony" appear at first sight sufficiently clear to justify an acceptance of their plain meaning, without giving any weight whatever to Congressman Poff's statement, we acknowledge that even when the statute is unambiguous, such indicia of legislative intent need not be dismissed out of hand. This Court has recently observed that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (*Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10). Nonetheless, when the legislative materials are as sparse as they are in this case, it seems appropriate also to remember that "statements [made on the House floor], even when they stand alone, have never

been regarded as sufficiently compelling to justify deviation from the plain language of a statute" (*United States* v. *Oregon*, 366 U.S. 643, 648). As Justice Jackson once observed: "[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions" (*Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 396 (concurring opinion)). That observation is particularly pertinent where, as here, the statement relied upon was made in only one of the two Houses of Congress and is contrary to both the language of the statute and the principal thrust of its legislative history.

Nothing else in the legislative history of Section 924(c) reinforces the proposition that the statute applies to certain, but not all, federal felonies. Indeed, Congressman Poff, when later asked to compare the coverage of his amendment to the Casey amendment, flatly stated: "My amendment would apply to all Federal felonies including heinous crimes in all grades, down to the lowest level of a felony" (114 Cong. Rec. 22233 (1968)). Moreover, the plain concern of House members was to impose additional deterrence on the use of firearms—"to persuade the man who is tempted to commit a Federal felony to leave his gun at home" (*id.* at 22231; remarks of Congressman Poff)—rather than to treat firearms and other dangerous weapons in the same manner. Thus, Congressman Horton stated:

> Even where the crime does not result in death or injury, the use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons effective only at a very short range. The 'equalizer' as it has been called, is a tool of terror, death, and injury in the hands of a criminal. He who stoops to point its barrel at an innocent victim * * * deserves to be singled out by the laws as the worse kind of social menace. [*Id.* at 22247.]

Whatever Congressman Poff's view may have been, therefore, there is no evidence that it was shared by his colleagues voting on the amendment.

Subsequent events also suggest that Congressman Poff's remarks did not reflect a common understanding of the coverage of Section 924(c). Approximately two months later, while the Gun Control Act remained pending, Senator Dominick introduced an amendment to the Senate version of the Gun Control Act that provided a sentence of up to life imprisonment for any person armed with a firearm while committing certain enumerated federal crimes. The list of crimes, included, *inter alia*, robbery and "any * * * assault with a dangerout [sic] weapon" (114

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[8] The text of the Dominick proposal was, in pertinent part, as follows:

> § 2401. Use of firearms in the commission of certain crimes of violence
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> Whoever, while engaged in the commission of any offense which is a crime of violence punishable under this title, is armed with any firearm, may in addition to the punishment provided for the crime be punished by imprisonment for an indeterminate number of years up to life, as determined by the court. Upon a subsequent conviction under this section by the same person, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.
>
> § 2402. Definitions
>
> As used in this chapter—
>
> "Crime of violence" means any of the following crimes or an attempt to commit any of the following crimes: murder; voluntary manslaughter; Presidential assassination, kidnaping, and assault; killing certain officers and employees of the United States; rape; kidnaping; assault with intent to kill, rob, rape, or poison; assault with a dangerout [sic] weapon, robbery; burglary; theft; racketeering; extortion; and arson.

Cong. Rec. 27142 (1968)).[8] Senator Dominick took express notice that several federal statutes, including Section 2113(d), already provided greater penalties for use of a "dangerous or deadly weapon" and then declared (*id.* at 27143):

> My amendment would not repeal these provisions nor would it diminish their effectiveness. While the terminology varies, in general it may be said that each of these sections covers any dangerous or deadly weapon. On the other hand, my amendment covers only firearms. As such, it is not intended to detract from these existing sections, but it would be available, if the prosecutor and the court desired, for the purpose of stronger penalties in those cases where firearms were involved.

Senator Murphy, who co-sponsored the Dominick amendment, recognized that it was designed as a counterpart of the House version already adopted. Although strongly supporting the Senate measure,

he noted that the House language made additional penalties for use of a firearm mandatory and that it applied to "any felony, as defined by this act." *Id.* at 27144. The Dominick amendment then passed the Senate after brief discussion and without any apparent opposition, but was replaced in the final version of the Gun Control Act by the Poff amendment, its apparent counterpart in the House.[9] Again, there is no evidence that the views reflected in the statement of Congressman Poff on the floor of the House had commended themselves to the other Congressmen or Senators acting on the bill.

In short, the legislative history of Section 924(c), even according due regard to the remarks of Congressman Poff, is not adequate to override the stat-

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[9] After the Dominick amendment passed, the Senate voted to amend the House bill, H.R. 17735, by deleting all of the House language following the enacting clause and substituting the text of the Senate bill, S. 3633, as amended. A conference committee subsequently adopted the House version of Section 924(c), except that the prohibitions on suspended sentences and probation were made applicable only to second and subsequent convictions and restrictions on concurrent sentencing were eliminated. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). The bill was signed by the President on October 22, 1968.

Title II of the Omnibus Crime Control Act of 1970 (Pub. L. 91-644, 84 Stat. 1889) amended Section 924(c) by reimposing the restriction that no sentence of imprisonment thereunder could be served concurrently with any term imposed for the underlying felony. The amendment also reduced the minimum mandatory sentence of imprisonment for repeat offenders from five to two years.

ute's clear language and purpose.[10] Congress was well aware that firearms, which can often be concealed, can discharge rapidly and repeatedly over great distances, and can use explosive substances, have a lethal potential that other dangerous weapons do not possess. Therefore, while Congress had already punished the use of "dangerous weapons" in committing some crimes (including bank robbery), it had ample reason to declare that any felon armed with a firearm would face yet additional punishment. We believe that it did so in Section 924(c).

C. The decisions of other courts of appeals recognize that Congress intended to apply Section 924(c) to all federal felonies.

Every court of appeals that has addressed the specific issue has agreed with the court below that Congress intended Section 924(c) to supplement the sanctions for bank robbery with a "dangerous weapon or device." See *United States* v. *Grant*, 549 F. 2d

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[10] Since the intent of Congress is sufficiently clear, there is no occasion for the Court to apply the rule of lenity. Compare *Rewis* v. *United States*, 401 U.S. 808, 812; *United States* v. *Bass*, *supra*, 404 U.S. at 347. That principle is applicable only when there is "uncertain[ty] about the statute's meaning." *Scarborough* v. *United States*, *supra*, slip op. 14; *United States* v. *Bramblett*, 348 U.S. 503, 510. Here, the wording of Section 924(c), its structure and its legislative history demonstrate with sufficient clarity that Congress intended to restrict the use of firearms to commit "any felony." Although penal laws are to be strictly construed, they "ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Company* v. *United States*, 2 Pet. 358, 367; *United States* v. *Bass*, *supra*, 404 U.S. at 351; *Huddleston* v. *United States*, *supra*, 415 U.S. at 831.

942, 948 (C.A. 4), certiorari denied, June 20, 1977, No. 76-6463, petition for writ of certiorari pending *sub nom. Whitehead* v. *United States*, No. 76-6258; *United States* v. *Crew*, 538 F.2d 575 (C.A. 4), certiorari denied *sub nom. Jones* v. *United States*, 429 U.S. 852; *Perkins* v. *United States*, 526 F.2d 688 (C.A. 5). See also *United States* v. *Ramirez*, 482 F.2d 807 (C.A. 2), certiorari denied *sub nom. Gomez* v. *United States*, 414 U.S. 1070; *United States* v. *Sudduth*, 457 F.2d 1198 (C.A. 10).[11] Although the various courts of appeals did not discuss the remarks of Congressman Poff, those decisions demonstrate at the least that, aside from those remarks, there is little reason to infer a congressional intent to limit punishment under Section 924(c) only to certain crimes. As the Fourth Circuit stated in *United States* v. *Crew*, *supra*, 538 F.2d at 577-578:

> [A]ppellants would have use equate "using a dangerous weapon or device" with "used or carried a firearm" * * *. However, it is clear that Congress never intended to equate these terms.
>
> The passage of Section 924(c) was a Congressional reaction to demands for "gun control" in the wake of political assassinations. It is a narrowly drawn statute intending to discourage a felon from using or carrying a firearm, and does not encompass the use of nonexplosive weapons. On the other hand, Section 2113(d) punishes a felon for the use of any weapon or device during the course of a bank robbery which jeopardized the lives of others. Therefore, the offenses are not identical in law and fact, and the separate sentences under Sections 2113(d) and 924(c) are [appropriate].

These decisions correctly emphasize the legislative policy to provide increased deterrence to the use of firearms in federal felonies. As the courts of appeals have noted, that intention is manifest in the legislative history of Section 924(c) and finds clear expression in the language of the statute itself. We believe, therefore, that the court of appeals in this case correctly concluded that petitioners were subject to cumulative punishment under Section 2113(d) and Section 924(c).

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[11] One court of appeals has taken a conflicting view. In *United States* v. *Eagle*, 539 F.2d 1166, the Eighth Circuit reversed the conviction under Section 924(c) of an Indian defendant convicted at the same trial for assault "with a dangerous weapon" in violation of the Major Crimes Act, 18 U.S.C. 1153. Based solely on the remark of Congressman Poff heretofore discussed, the court concluded that "the legislative history" of Section 924(c)(1) undercut its application in such a case "because § 1153 itself provides an increased penalty for use of a dangerous weapon" (539 F.2d at 1171). The court stated that it was "not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute * * * and [this] apparently was not intended by Congress" (*id.* at 1172). For the reasons set forth above, we believe that conclusion to be incorrect.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

H. BARTOW FARR, III,
Assistant to the Solicitor General.

WILLIAM G. OTIS,
JOHN J. KLEIN,
Attorneys.

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* The Solicitor General is disqualified in this case.

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